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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, and STATE OF TEXAS, et al.,

Appellants,

VS.

J. AND R. DOE, as Guardians Ad Litem for I. DOE, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS JAMES PLYLER, ET AL.

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of Pacific Legal Foundation (PLF) pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad

public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument regarding the issues at stake in this case such as the right of illegal aliens to bring suits in equity to preserve the fruits of their wrongdoing.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at 628 F.2d 448 (5th Cir. 1980).

STATEMENT OF THE CASE

A group of illegal aliens has challenged, on behalf of their children, also illegal aliens, the constitutionality of Section 21.031 of the Texas Education Code and the implementing policy of the Tyler Independent School District (TISD). Section 21.031 provides for the free public education of children who are lawful residents of Texas, including citizens and legally admitted aliens. TISD implemented the statute by charging a tuition of $1,000 per year for each illegal alien as a prerequisite to enrollment in the Tyler public schools. The illegal alien plaintiffs sought and obtained an injunction from the United States District Court for the Eastern District of Texas on the basis, *inter alia*, that the statute and Tyler policy violated the rights

of illegal aliens to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. The injunction was affirmed on that basis by the United States Court of Appeals, Fifth Circuit.

SUMMARY OF ARGUMENT

1. Injunctions are equitable proceedings and require invocation of the equitable maxim forbidding judicial assistance to those with unclean hands. This maxim prohibits maintenance of suits by illegal aliens to preserve the fruits of their wrongdoing.

2. States are permitted to limit their public resources to citizens of the state and legally admitted aliens.

3. Texas has a rational basis for its policy in refusing to undermine the federal laws which its officers are sworn to uphold.

ARGUMENT

I

ILLEGAL ALIENS' UNCLEAN HANDS PRECLUDE THEM FROM TAKING ADVANTAGE OF THEIR OWN WRONGDOING

This case was brought by "a group of undocumented [illegal alien] children, represented by their parents," seeking to enjoin Texas Education Code § 21.031 as a denial of the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution. *Doe v. Plyler*, 628 F.2d 448, 450 (5th Cir. 1980). The statute at issue provides that children who are citizens of the United States or legally admitted aliens shall be permitted to attend the public free schools of the district in which they

reside or in which their parent or guardian resides. Tex. Educ. Code § 21.031. The statute further provides that such citizens and lawfully admitted aliens between the ages of five and twenty-one are entitled to the benefits of the Available School Fund. *Id.* TISD implemented the policy of this statute by charging a tuition of $1,000 per year for each illegal alien child as a prerequisite to enrollment in the Tyler public schools. *Doe v. Plyler,* 628 F.2d at 450. The illegal alien parents and children also sought to enjoin TISD from enforcement of this policy. *Id.* The District Court's granting of these injunctions was affirmed by the Court of Appeals. *Id.* at 461.

In exercising this injunctive power, the courts below were acting as courts of equity. *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company,* 363 U.S. 528, 531-32 (1960). As this Court held in *Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240, 244-45 (1933):

> "'It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into the court with clean hands.' . . . The governing principle is 'that whenever a party who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' Pom. Eq. Jur. 4th ed. § 397. This court has declared: 'It is a principle in

> chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.' Bein v. Heath, 6 How. 228, 247, 12 L. ed. 416, 424." *Keystone Driller,* 290 U.S. at 244-45 (emphasis in original).

The courts below failed to apply this principle of equity, even while acknowledging that plaintiff illegal aliens were breaking the law.

> "The plaintiffs undeniably stand in violation of federal law, but certainly they have committed no moral wrong. As children they are under the actual and legal control of their parents. [Footnote omitted.] To suggest that plaintiffs are being excluded from education for their own illegal actions places form over substance." *Doe v. Plyler,* 628 F.2d at 457.

It is difficult, even in this modern era, to understand a court holding that while plaintiffs are "undeniably" committing a crime, they are "certainly" committing "no moral wrong." The State of Texas and the lay public may be forgiven for their old fashioned belief that the commission of any crime is morally wrong. Obedience to validly enacted law is the basis of our republic. Neither plaintiffs nor the Court of Appeals challenged the constitutionality of the federal immigration laws. Yet, the court states its certainty that in violating these federal laws, plaintiffs "committed no moral wrong." It is this type of statement which shreds the fabric of respect for law in society.

If the Court of Appeals was trying to say that the illegal alien children were morally blameless for breaking the law because they were under the control of their parents, the court should not then have referred to "plaintiffs." As the court noted earlier, the litigation was initiated by "[a] group of undocumented children, represented by their parents." *Id.* at 450. Thus, the litigation was conducted not merely by the children but by their parents as well. The Court of Appeals, rather cavalierly, shrugged the whole matter off saying:

> "But we have ascertained no legal precedent for determining that the commission of a federal misdemeanor [footnote omitted] may *in and of itself* serve as the legitimate basis for state-imposed disabilities." *Id.* at 458 (emphasis in original).

This statement directly contradicts the principles of equity. This Court held in *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945), that the maxim of clean hands closes the doors of a court of equity to one tainted with bad faith relative to the matter in which he seeks relief and demands that a party shall have acted fairly and without fraud or deceit as to the controversy in issue. The Court of Appeals blithely dismisses the violation of immigration laws as a mere misdemeanor, failing to note that under immigration law, second and subsequent illegal entries are felonies (8 U.S.C. § 1325) and that at least some of the plaintiffs are probably felons. The degree of the offense, however, is not the controlling factor.

> "Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a

crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

"Moreover, where a suit in equity concerns the public interest as well as the private interest of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of this transgression but averts an injury to the public." *Precision Instrument*, 324 U.S. at 815.

Illegal entry into the United States is a crime, punishable either as a felony or a misdemeanor, and is therefore wrong, both legally and morally. Because this lawsuit is one concerning the public interest of the people of Texas and others who believe in the moral sanctity of law, the courts are bound to give the principle of clean hands even wider significance. Equity, as well as our national tradition of respect for the law, demands that plaintiffs in this case be prevented from enjoying the fruits of their crimes at the expense of the lawful residents of the state.

In *Alonso v. State of California*, 50 Cal. App. 3d 242, 254 (1975), the California Court of Appeal, citing *Reid v. Immigration & Naturalization Service*, 420 U.S. 619 (1975), ruled:

"To allow an illegal alien to collect unemployment benefits would reward him for his illegal entry into this country. In essence, his entry into this country is fraudulent, and as such he should not be allowed to profit from the illegal act."

The essence of equity therefore prevents plaintiffs from brazenly flouting federal law while simultaneously using the federal judiciary to claim benefits restricted under state law to those observing the laws. Plaintiff-appellees have no standing in equity to claim the benefits of equity; their case should be summarily dismissed.

II

STATES MAY RESTRICT BENEFITS TO LAWFUL RESIDENTS

The Texas statute makes free public education available only to residents of the several school districts. Tex. Educ. Code § 21.031(b), (c). This restriction applies not only to illegal aliens but to lawful residents of other states. The Court of Appeals concluded that residents from outside the state cannot claim a Fourteenth Amendment right to attend the Texas schools because only persons within the jurisdiction of Texas can claim the equal protection of its laws. *Doe v. Plyler*, 628 F.2d at 457 n.24. This rationale is too facile.

It is only too obvious that a resident of a neighboring state would only have to commute from a neighboring state across the Texas border; he would then be in Texas and within the jurisdiction of Texas laws. Under the court's rationale, this out-of-state resident would then be entitled to a free public education at the expense of the Texas taxpayers. This would be an absurd result. What the court has overlooked, and the Texas Legislature has not, is the concept of lawful residence.

This Court held in *Elkins v. Moreno*, 435 U.S. 647, 668 (1978), that the question whether a certain class of law-

fully admitted aliens could obtain lawful permanent residence or domicile in a state "is purely a matter of state law." Obviously the State of Texas in enacting Texas Education Code § 21.031 determined that illegal aliens cannot become domiciliaries of the state. This is consistent with the law in federal jurisdictions.

In *Barber v. Varleta*, 199 F.2d 419, 422 (9th Cir. 1952), the court held:

> "Under the rule commonly applied to unlawful entries into the United States by aliens generally, appellee could not have established a domicile in continental United States or acquire a lawful permanent residence there."

The recent decision of *Castillo-Felix v. Immigration & Naturalization Service*, 601 F.2d 459 (9th Cir. 1979), similarly upheld the Immigration and Naturalization Service's position that an alien cannot be lawfully domiciled in this country unless "'lawfully admitted for permanent residence.'" *Id.* at 463.

This Court, in dealing with questions of state exclusion of aliens from public benefits such as financial assistance for education, has acted in the context of lawfully admitted *resident* aliens. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 2 (1977). As noted above, the critical question in *Elkins v. Moreno, supra*, was whether, under state law, the plaintiffs were domiciliaries and therefore entitled to state financial assistance. This Court has made clear that a state may exclude nonresidents, alien or otherwise, from its educational assistance.

In *Vlandis v. Kline*, 412 U.S. 441 (1973), this Court held unconstitutional a Connecticut statute which established a permanent and unrebuttable presumption that students who had an out-of-state address within one year preceding application for admission to the state university remained nonresidents. This Court found such a presumption was not necessarily true and therefore violated the Due Process Clause of the Fourteenth Amendment. This Court went on to observe:

> "We are aware, of course, of the special problems involved in determining the *bona fide residence* of college students who come from out of State to attend that State's public university. Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, *for purposes of tuition and fees, just because they go to school there.* ... We fully recognize that the State has a legitimate interest in protecting and preserving the quality of its colleges and universities and *the right of its own bona fide residents* to attend such institutions *on a preferential tuition basis.*" *Id.* at 452-53 (emphasis added).

Justice White concurred in the judgment on the basis that although the state

> "may legally discriminate between its residents and nonresidents for purposes of tuition, here [it] invidiously discriminates among at least three classes of bona fide Connecticut residents." *Id.* at 456.

Both opinions make clear that the state may indeed discriminate for purpose of tuition between residents and nonresidents. What the state may not do is discriminate

between classes of bona fide state residents. What distinguishes the case at bar is that plaintiffs are not bona fide residents of the state; they are persons whose very presence in the state is illegal. Under *Vlandis* then, Texas has no duty to make its schools available to non bona fide residents on a tuition free basis.

III

THERE IS A RATIONAL BASIS FOR DECLINING TO PROVIDE FREE SCHOOLING TO ILLEGAL ALIENS

This Court held in *Graham v. Richardson*, 403 U.S. 365, 371 (1971), that under traditional equal protection principles a state retains broad discretion to classify, including classifications in the area of economics and social welfare, provided that such classification has a reasonable basis. Although classifications based on alienage are inherently suspect and subject to close judicial scrutiny (*id.* at 371-72) we are not here dealing with a classification based on alienage but on legal residence. State citizens and legally admitted aliens qualify for free schooling. But out-of-state residents, including illegal aliens, do not qualify. Legal residents of New Mexico, Oklahoma, or Louisiana suffer the same disabilities as legal residents of Mexico, Guatemala, or Canada who have entered the country unlawfully. As noted earlier, *Vlandis v. Kline* holds that a state has a legitimate interest in protecting and preserving the right of its own bona fide residents to attend its institutions of public education on a preferential tuition basis. 412 U.S. 452-53.

Even if the classification were not based on lawful state residence but upon the distinction between illegal aliens

and everyone else, such distinction has a rational basis. In *Mathews v. Diaz*, 426 U.S. 67 (1976), this Court recognized the right of Congress to exclude certain classes of aliens from public benefits:

> "In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, *nor the illegal entrant*, can advance even a colorable constitutional claim to share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests." *Id.* at 80 (emphasis in original).

While the powers of Congress to exclude all types of aliens from benefits admittedly exceed those of the states, the states are not therefore preempted from control over state benefits. In *De Canas v. Bica*, 424 U.S. 351 (1976), this Court reversed a lower court ruling that California was preempted from prohibiting the employment of illegal aliens where such employment would have an adverse effect on lawful residents. This Court noted that states possess broad authority under their police powers to regulate employment relationships so as to protect workers within the state. *Id.* at 356. This Court held:

> "California's attempt in § 2805(a) to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation. ... These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. *In attempting to pro-*

> *tect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils." Id.* at 356-57 (emphasis added).

These justifications are analogous to those advanced by Texas in support of its school policy and rejected by the Court of Appeals. *Doe v. Plyler,* 628 F.2d at 458-60. It is ironic that the Court of Appeals implicitly suggested that Texas deal with its illegal alien problem by prohibiting the employment of illegal aliens. The irony lies in the fact that the court's rationale in striking down the Texas school policy would apply with even more force to the suggested employment policy.

This Court held in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), that education is not a fundamental right. This may be contrasted with this Court's holding in *Truax v. Raich,* 239 U.S. 33, 41 (1915), that the right to work for a living is a fundamental right, indeed the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. In striking an employment limitation for lawfully admitted aliens, the Court noted:

> "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states." *Id.* at 39-40.

Here, Texas is availing itself of this right to limit the distribution of its common resources to its citizens and law-

fully resident aliens as against illegal aliens and citizens of other states.

If a nonfundamental right such as education cannot be denied to illegal aliens, as the Court of Appeals holds, how can that court suggest that the fundamental right of employment should be denied. The answer seems to be that the lower court feels more sympathy for school age children than for adult workers. While such an emotion is humanly understandable, it is not the basis on which to render constitutional decisions striking down state laws.

In *Alonso v. State of California, supra,* the California Court of Appeal concurred in the rationale expressed by state authorities in denying unemployment insurance benefits to illegal aliens.

> " 'It would be an absurd consequence for the Department of Human Resources Development of the State of California to assist a person, an illegal entrant, seeking advantages that, in our opinion, are available only to citizens and others who are lawfully admitted to our country. Denied unemployment benefits, he will not be as likely "to succeed in maintaining himself and accomplishing his cheat upon the government." . . .
>
> " 'We do not feel compelled by the Fourteenth Amendment or the laws adopted under it to grant benefits to the claimant. If an alien comes here legally, he is entitled to equal protection of the law (Ex parte Kurth, 28 Fed.Supp. 258, 263), but the claimant, being an illegal entrant, "does not have the status of a nonresident alien, or resident alien, and while it may be difficult according to the strict definitions of international law to classify him, it clearly appears that he is a defiant person challenging the ability of this coun-

try to enforce its own laws." The protection of the Fourteenth Amendment does not extend to giving an illegal entrant the right to demand the assistance of the State "in frustrating the plain purpose of Congressional Acts regulating immigration." . . .

" 'Our conclusion that the claimant is not entitled to benefits has a rational basis related to a national as well as state public policy and is reasonably calculated to carry out that policy (*Dandridge v. Williams* (1970), 397 U.S. 471, 90 S.Ct. 1153). . . .

" 'We have an obligation not to subvert the federal statutory scheme which controls the presence of aliens and immigrants in this country.' " *Id.* at 252-53.

In the same manner, the State of Texas has a rational basis to deny its free public education to defiant illegal aliens who mock the inability of this country to enforce its laws. The Fourteenth Amendment does not require Texas to assist these persons in frustrating the congressional purpose in regulating immigration. State officers are sworn to uphold federal as well as state law. Nothing in the Fourteenth Amendment requires state authorities to be accessories to criminal violations.

CONCLUSION

Plaintiff-appellees come defiantly before the courts of this nation, flouting their violations of federal immigration laws in violation of the rules of equity and common sense. The equitable principle of clean hands commands that the courts not assist law breakers in reaping the fruits of their violations. Nor should plaintiffs succeed on the merits. Illegal aliens are not lawful residents of a state and are not entitled to the privileges extended to such residents.

A state has a rational basis in maintaining its integrity through denying its assistance to persons who brazenly defy the law.

For the reasons set forth in this brief, amicus curiae Pacific Legal Foundation urges this Court to reverse the decision of the Court of Appeals and affirm the constitutionality of Texas Education Code § 21.031 and the policy of the Tyler Independent School District.

Respectfully submitted,

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